

109TH CONGRESS
1ST SESSION

S. 494

To amend chapter 23 of title 5, United States Code, to clarify the disclosures of information protected from prohibited personnel practices, require a statement in nondisclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 2, 2005

Mr. AKAKA (for himself, Ms. COLLINS, Mr. GRASSLEY, Mr. LEVIN, Mr. LEAHY, Mr. VOINOVICH, Mr. LIEBERMAN, Mr. COLEMAN, Mr. DURBIN, Mr. DAYTON, Mr. PRYOR, Mr. JOHNSON, Mr. LAUTENBERG, and Mr. CARPER) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

A BILL

To amend chapter 23 of title 5, United States Code, to clarify the disclosures of information protected from prohibited personnel practices, require a statement in nondisclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. PROTECTION OF CERTAIN DISCLOSURES OF IN-**
2 **FORMATION BY FEDERAL EMPLOYEES.**

3 (a) **SHORT TITLE.**—This Act may be cited as the
4 “Federal Employee Protection of Disclosures Act”.

5 (b) **CLARIFICATION OF DISCLOSURES COVERED.**—
6 Section 2302(b)(8) of title 5, United States Code, is
7 amended—

8 (1) in subparagraph (A)—

9 (A) by striking “which the employee or ap-
10 plicant reasonably believes evidences” and in-
11 serting “, without restriction to time, place,
12 form, motive, context, or prior disclosure made
13 to any person by an employee or applicant, in-
14 cluding a disclosure made in the ordinary
15 course of an employee’s duties, that the em-
16 ployee or applicant reasonably believes is evi-
17 dence of”; and

18 (B) in clause (i), by striking “a violation”
19 and inserting “any violation”;

20 (2) in subparagraph (B)—

21 (A) by striking “which the employee or ap-
22 plicant reasonably believes evidences” and in-
23 serting “, without restriction to time, place,
24 form, motive, context, or prior disclosure made
25 to any person by an employee or applicant, in-
26 cluding a disclosure made in the ordinary

1 course of an employee's duties, of information
 2 that the employee or applicant reasonably be-
 3 lieves is evidence of"; and

4 (B) in clause (i), by striking "a violation"
 5 and inserting "any violation (other than a viola-
 6 tion of this section)"; and

7 (3) by adding at the end the following:

8 "(C) any disclosure that—

9 "(i) is made by an employee or appli-
 10 cant of information required by law or Ex-
 11 ecutive order to be kept secret in the inter-
 12 est of national defense or the conduct of
 13 foreign affairs that the employee or appli-
 14 cant reasonably believes is direct and spe-
 15 cific evidence of—

16 "(I) any violation of any law,
 17 rule, or regulation;

18 "(II) gross mismanagement, a
 19 gross waste of funds, an abuse of au-
 20 thority, or a substantial and specific
 21 danger to public health or safety; or

22 "(III) a false statement to Con-
 23 gress on an issue of material fact; and
 24 "(ii) is made to—

1 “(I) a member of a committee of
 2 Congress having a primary responsi-
 3 bility for oversight of a department,
 4 agency, or element of the Federal
 5 Government to which the disclosed in-
 6 formation relates and who is author-
 7 ized to receive information of the type
 8 disclosed;

9 “(II) any other Member of Con-
 10 gress who is authorized to receive in-
 11 formation of the type disclosed; or

12 “(III) an employee of Congress
 13 who has the appropriate security
 14 clearance and is authorized to receive
 15 information of the type disclosed.”.

16 (c) COVERED DISCLOSURES.—Section 2302(a)(2) of
 17 title 5, United States Code, is amended—

18 (1) in subparagraph (B)(ii), by striking “and”
 19 at the end;

20 (2) in subparagraph (C)(iii), by striking the pe-
 21 riod at the end and inserting “; and”; and

22 (3) by adding at the end the following:

23 “(D) ‘disclosure’ means a formal or informal
 24 communication or transmission, but does not include
 25 a communication concerning policy decisions that

1 lawfully exercise discretionary authority unless the
2 employee providing the disclosure reasonably believes
3 that the disclosure evidences—

4 “(i) any violation of any law, rule, or
5 regulation; or

6 “(ii) gross management, a gross waste
7 of funds, an abuse of authority, or a sub-
8 stantial and specific danger to public
9 health or safety.”.

10 (d) REBUTTABLE PRESUMPTION.—Section 2302(b)
11 of title 5, United States Code, is amended by amending
12 the matter following paragraph (12) to read as follows:
13 “This subsection shall not be construed to authorize the
14 withholding of information from Congress or the taking
15 of any personnel action against an employee who discloses
16 information to Congress, except that an employee or appli-
17 cant may be disciplined for the disclosure of information
18 described in paragraph (8)(C)(i) to a Member or employee
19 of Congress who is not authorized to receive such informa-
20 tion. For purposes of paragraph (8), any presumption re-
21 lating to the performance of a duty by an employee who
22 has authority to take, direct others to take, recommend,
23 or approve any personnel action may be rebutted by sub-
24 stantial evidence. For purposes of paragraph (8), a deter-
25 mination as to whether an employee or applicant reason-

ably believes that they have disclosed information that evi-
dences any violation of law, rule, regulation, gross mis-
management, a gross waste of funds, an abuse of author-
ity, or a substantial and specific danger to public health
or safety shall be made by determining whether a disin-
terested observer with knowledge of the essential facts
known to and readily ascertainable by the employee would
reasonably conclude that the actions of the Government
evidence such violations, mismanagement, waste, abuse, or
danger.”.

(e) NONDISCLOSURE POLICIES, FORMS, AND AGREE-
MENTS; SECURITY CLEARANCES; AND RETALIATORY IN-
VESTIGATIONS.—

(1) PERSONNEL ACTION.—Section
2302(a)(2)(A) of title 5, United States Code, is
amended—

(A) in clause (x), by striking “and” after
the semicolon; and

(B) by redesignating clause (xi) as clause
(xiv) and inserting after clause (x) the fol-
lowing:

“(xi) the implementation or enforce-
ment of any nondisclosure policy, form, or
agreement;

1 “(xii) a suspension, revocation, or
 2 other determination relating to a security
 3 clearance or any other access determina-
 4 tion by a covered agency;

5 “(xiii) an investigation, other than
 6 any ministerial or nondiscretionary fact
 7 finding activities necessary for the agency
 8 to perform its mission, of an employee or
 9 applicant for employment because of any
 10 activity protected under this section; and”

11 (2) PROHIBITED PERSONNEL PRACTICE.—Sec-
 12 tion 2302(b) of title 5, United States Code, is
 13 amended—

14 (A) in paragraph (11), by striking “or” at
 15 the end;

16 (B) in paragraph (12), by striking the pe-
 17 riod and inserting a semicolon; and

18 (C) by inserting after paragraph (12) the
 19 following:

20 “(13) implement or enforce any nondisclosure
 21 policy, form, or agreement, if such policy, form, or
 22 agreement does not contain the following statement:
 23 “These provisions are consistent with and do not su-
 24 persede, conflict with, or otherwise alter the em-
 25 ployee obligations, rights, or liabilities created by

1 Executive Order No. 12958; section 7211 of title 5,
2 United States Code (governing disclosures to Con-
3 gress); section 1034 of title 10, United States Code
4 (governing disclosure to Congress by members of the
5 military); section 2302(b)(8) of title 5, United
6 States Code (governing disclosures of illegality,
7 waste, fraud, abuse, or public health or safety
8 threats); the Intelligence Identities Protection Act of
9 1982 (50 U.S.C. 421 et seq.) (governing disclosures
10 that could expose confidential Government agents);
11 and the statutes which protect against disclosures
12 that could compromise national security, including
13 sections 641, 793, 794, 798, and 952 of title 18,
14 United States Code, and section 4(b) of the Subver-
15 sive Activities Control Act of 1950 (50 U.S.C.
16 783(b)). The definitions, requirements, obligations,
17 rights, sanctions, and liabilities created by such Ex-
18 ecutive order and such statutory provisions are in-
19 corporated into this agreement and are controlling’;
20 or

21 “(14) conduct, or cause to be conducted, an in-
22 vestigation, other than any ministerial or nondis-
23 cretionary fact finding activities necessary for the
24 agency to perform its mission, of an employee or ap-

1 plicant for employment because of any activity pro-
 2 tected under this section.”.

3 (3) BOARD AND COURT REVIEW OF ACTIONS
 4 RELATING TO SECURITY CLEARANCES.—

5 (A) IN GENERAL.—Chapter 77 of title 5,
 6 United States Code, is amended by inserting
 7 after section 7702 the following:

8 **“§ 7702a. Actions relating to security clearances**

9 “(a) In any appeal relating to the suspension, revoca-
 10 tion, or other determination relating to a security clear-
 11 ance or access determination, the Merit Systems Protec-
 12 tion Board or any reviewing court—

13 “(1) shall determine whether paragraph (8) or
 14 (9) of section 2302(b) was violated;

15 “(2) may not order the President or the des-
 16 ignee of the President to restore a security clearance
 17 or otherwise reverse a determination of clearance
 18 status or reverse an access determination; and

19 “(3) subject to paragraph (2), may issue declar-
 20 atory relief and any other appropriate relief.

21 “(b)(1) If, in any final judgment, the Board or court
 22 declares that any suspension, revocation, or other deter-
 23 mination with regards to a security clearance or access
 24 determination was made in violation of paragraph (8) or
 25 (9) of section 2302(b), the affected agency shall conduct

1 a review of that suspension, revocation, access determina-
2 tion, or other determination, giving great weight to the
3 Board or court judgment.

4 “(2) Not later than 30 days after any Board or court
5 judgment declaring that a security clearance suspension,
6 revocation, access determination, or other determination
7 was made in violation of paragraph (8) or (9) of section
8 2302(b), the affected agency shall issue an unclassified re-
9 port to the congressional committees of jurisdiction (with
10 a classified annex if necessary), detailing the cir-
11 cumstances of the agency’s security clearance suspension,
12 revocation, other determination, or access determination.
13 A report under this paragraph shall include any proposed
14 agency action with regards to the security clearance or ac-
15 cess determination.

16 “(c) An allegation that a security clearance or access
17 determination was revoked or suspended in retaliation for
18 a protected disclosure shall receive expedited review by the
19 Office of Special Counsel, the Merit Systems Protection
20 Board, and any reviewing court.

21 “(d) For purposes of this section, corrective action
22 may not be ordered if the agency demonstrates by a pre-
23 ponderance of the evidence that it would have taken the
24 same personnel action in the absence of such disclosure.”.

1 (B) TECHNICAL AND CONFORMING AMEND-
 2 MENT.—The table of sections for chapter 77 of
 3 title 5, United States Code, is amended by in-
 4 serting after the item relating to section 7702
 5 the following:

“7702a. Actions relating to security clearances.”.

6 (f) EXCLUSION OF AGENCIES BY THE PRESIDENT.—
 7 Section 2302(a)(2)(C) of title 5, United States Code, is
 8 amended by striking clause (ii) and inserting the following:

9 “(ii)(I) the Federal Bureau of Investiga-
 10 tion, the Central Intelligence Agency, the De-
 11 fense Intelligence Agency, the National Imagery
 12 and Mapping Agency, the National Security
 13 Agency; and

14 “(II) as determined by the President, any
 15 executive agency or unit thereof the principal
 16 function of which is the conduct of foreign in-
 17 telligence or counterintelligence activities, if the
 18 determination (as that determination relates to
 19 a personnel action) is made before that per-
 20 sonnel action; or”.

21 (g) ATTORNEY FEES.—Section 1204(m)(1) of title 5,
 22 United States Code, is amended by striking “agency in-
 23 volved” and inserting “agency where the prevailing party
 24 is employed or has applied for employment”.

1 (h) DISCIPLINARY ACTION.—Section 1215(a)(3) of
2 title 5, United States Code, is amended to read as follows:

3 “(3)(A) A final order of the Board may im-
4 pose—

5 “(i) disciplinary action consisting of re-
6 moval, reduction in grade, debarment from
7 Federal employment for a period not to exceed
8 5 years, suspension, or reprimand;

9 “(ii) an assessment of a civil penalty not to
10 exceed \$1,000; or

11 “(iii) any combination of disciplinary ac-
12 tions described under clause (i) and an assess-
13 ment described under clause (ii).

14 “(B) In any case in which the Board finds that
15 an employee has committed a prohibited personnel
16 practice under paragraph (8) or (9) of section
17 2302(b), the Board shall impose disciplinary action
18 if the Board finds that the activity protected under
19 paragraph (8) or (9) of section 2302(b) was a sig-
20 nificant motivating factor, even if other factors also
21 motivated the decision, for the employee’s decision to
22 take, fail to take, or threaten to take or fail to take
23 a personnel action, unless that employee dem-
24 onstrates, by preponderance of evidence, that the
25 employee would have taken, failed to take, or threat-

1 ened to take or fail to take the same personnel ac-
 2 tion, in the absence of such protected activity.”.

3 (i) SPECIAL COUNSEL AMICUS CURIAE APPEAR-
 4 ANCE.—Section 1212 of title 5, United States Code, is
 5 amended by adding at the end the following:

6 “(h)(1) The Special Counsel is authorized to appear
 7 as amicus curiae in any action brought in a court of the
 8 United States related to any civil action brought in con-
 9 nection with section 2302(b) (8) or (9), or subchapter III
 10 of chapter 73, or as otherwise authorized by law. In any
 11 such action, the Special Counsel is authorized to present
 12 the views of the Special Counsel with respect to compli-
 13 ance with section 2302(b) (8) or (9) or subchapter III of
 14 chapter 77 and the impact court decisions would have on
 15 the enforcement of such provisions of law.

16 “(2) A court of the United States shall grant the ap-
 17 plication of the Special Counsel to appear in any such ac-
 18 tion for the purposes described in subsection (a).”.

19 (j) JUDICIAL REVIEW.—

20 (1) IN GENERAL.—Section 7703(b)(1) of title
 21 5, United States Code, is amended to read as fol-
 22 lows:

23 “(b)(1)(A) Except as provided in subparagraph (B)
 24 and paragraph (2), a petition to review a final order or
 25 final decision of the Board shall be filed in the United

1 States Court of Appeals for the Federal Circuit. Notwith-
 2 standing any other provision of law, any petition for re-
 3 view must be filed within 60 days after the date the peti-
 4 tioner received notice of the final order or decision of the
 5 Board.

6 “(B) During the 5-year period beginning on the effec-
 7 tive date of the Federal Employee Protection of Disclo-
 8 sures Act, a petition to review a final order or final deci-
 9 sion of the Board in a case alleging a violation of para-
 10 graph (8) or (9) of section 2302(b) shall be filed in the
 11 United States Court of Appeals for the Federal Circuit
 12 or any court of appeals of competent jurisdiction as pro-
 13 vided under subsection (b)(2).”.

14 (2) REVIEW OBTAINED BY OFFICE OF PER-
 15 SONNEL MANAGEMENT.—Section 7703(d) of title 5,
 16 United States Code, is amended to read as follows:

17 “(d)(1) Except as provided under paragraph (2), this
 18 paragraph shall apply to any review obtained by the Direc-
 19 tor of the Office of Personnel Management. The Director
 20 of the Office of Personnel Management may obtain review
 21 of any final order or decision of the Board by filing, within
 22 60 days after the date the Director received notice of the
 23 final order or decision of the Board, a petition for judicial
 24 review in the United States Court of Appeals for the Fed-
 25 eral Circuit if the Director determines, in his discretion,

1 that the Board erred in interpreting a civil service law,
2 rule, or regulation affecting personnel management and
3 that the Board's decision will have a substantial impact
4 on a civil service law, rule, regulation, or policy directive.
5 If the Director did not intervene in a matter before the
6 Board, the Director may not petition for review of a Board
7 decision under this section unless the Director first peti-
8 tions the Board for a reconsideration of its decision, and
9 such petition is denied. In addition to the named respond-
10 ent, the Board and all other parties to the proceedings
11 before the Board shall have the right to appear in the pro-
12 ceeding before the Court of Appeals. The granting of the
13 petition for judicial review shall be at the discretion of the
14 Court of Appeals.

15 “(2) During the 5-year period beginning on the effec-
16 tive date of the Federal Employee Protection of Disclo-
17 sures Act, this paragraph shall apply to any review relat-
18 ing to paragraph (8) or (9) of section 2302(b) obtained
19 by the Director of the Office of Personnel Management.
20 The Director of the Office of Personnel Management may
21 obtain review of any final order or decision of the Board
22 by filing, within 60 days after the date the Director re-
23 ceived notice of the final order or decision of the Board,
24 a petition for judicial review in the United States Court
25 of Appeals for the Federal Circuit or any court of appeals

1 of competent jurisdiction as provided under subsection
 2 (b)(2) if the Director determines, in his discretion, that
 3 the Board erred in interpreting paragraph (8) or (9) of
 4 section 2302(b). If the Director did not intervene in a
 5 matter before the Board, the Director may not petition
 6 for review of a Board decision under this section unless
 7 the Director first petitions the Board for a reconsideration
 8 of its decision, and such petition is denied. In addition
 9 to the named respondent, the Board and all other parties
 10 to the proceedings before the Board shall have the right
 11 to appear in the proceeding before the court of appeals.
 12 The granting of the petition for judicial review shall be
 13 at the discretion of the Court of Appeals.”.

14 (k) NONDISCLOSURE POLICIES, FORMS, AND AGREE-
 15 MENTS.—

16 (1) IN GENERAL.—

17 (A) REQUIREMENT.—Each agreement in
 18 Standard Forms 312 and 4414 of the Govern-
 19 ment and any other nondisclosure policy, form,
 20 or agreement of the Government shall contain
 21 the following statement: “These restrictions are
 22 consistent with and do not supersede, conflict
 23 with, or otherwise alter the employee obliga-
 24 tions, rights, or liabilities created by Executive
 25 Order No. 12958; section 7211 of title 5,

1 United States Code (governing disclosures to
2 Congress); section 1034 of title 10, United
3 States Code (governing disclosure to Congress
4 by members of the military); section 2302(b)(8)
5 of title 5, United States Code (governing disclo-
6 sures of illegality, waste, fraud, abuse or public
7 health or safety threats); the Intelligence Iden-
8 tities Protection Act of 1982 (50 U.S.C. 421 et
9 seq.) (governing disclosures that could expose
10 confidential Government agents); and the stat-
11 utes which protect against disclosure that may
12 compromise the national security, including sec-
13 tions 641, 793, 794, 798, and 952 of title 18,
14 United States Code, and section 4(b) of the
15 Subversive Activities Act of 1950 (50 U.S.C.
16 783(b)). The definitions, requirements, obliga-
17 tions, rights, sanctions, and liabilities created
18 by such Executive order and such statutory
19 provisions are incorporated into this agreement
20 and are controlling.”.

21 (B) ENFORCEABILITY.—Any nondisclosure
22 policy, form, or agreement described under sub-
23 paragraph (A) that does not contain the state-
24 ment required under subparagraph (A) may not
25 be implemented or enforced to the extent such

1 policy, form, or agreement is inconsistent with
2 that statement.

3 (2) PERSONS OTHER THAN GOVERNMENT EM-
4 PLOYEES.—Notwithstanding paragraph (1), a non-
5 disclosure policy, form, or agreement that is to be
6 executed by a person connected with the conduct of
7 an intelligence or intelligence-related activity, other
8 than an employee or officer of the United States
9 Government, may contain provisions appropriate to
10 the particular activity for which such document is to
11 be used. Such form or agreement shall, at a min-
12 imum, require that the person will not disclose any
13 classified information received in the course of such
14 activity unless specifically authorized to do so by the
15 United States Government. Such nondisclosure
16 forms shall also make it clear that such forms do
17 not bar disclosures to Congress or to an authorized
18 official of an executive agency or the Department of
19 Justice that are essential to reporting a substantial
20 violation of law.

21 (l) CLARIFICATION OF WHISTLEBLOWER RIGHTS
22 FOR CRITICAL INFRASTRUCTURE INFORMATION.—Section
23 214(c) of the Homeland Security Act of 2002 (6 U.S.C.
24 133(c)) is amended by adding at the end the following:
25 “For purposes of this section a permissible use of inde-

1 pendently obtained information includes the disclosure of
 2 such information under section 2302(b)(8) of title 5,
 3 United States Code.”.

4 (m) ADVISING EMPLOYEES OF RIGHTS.—Section
 5 2302(c) of title 5, United States Code, is amended by in-
 6 serting “, including how to make a lawful disclosure of
 7 information that is specifically required by law or Execu-
 8 tive order to be kept secret in the interest of national de-
 9 fense or the conduct of foreign affairs to the Special Coun-
 10 sel, the Inspector General of an agency, Congress, or other
 11 agency employee designated to receive such disclosures”
 12 after “chapter 12 of this title”.

13 (n) SCOPE OF DUE PROCESS.—

14 (1) SPECIAL COUNSEL.—Section
 15 1214(b)(4)(B)(ii) of title 5, United States Code, is
 16 amended by inserting “, after a finding that a pro-
 17 tected disclosure was a contributing factor,” after
 18 “ordered if”.

19 (2) INDIVIDUAL ACTION.—Section 1221(e)(2)
 20 of title 5, United States Code, is amended by insert-
 21 ing “, after a finding that a protected disclosure was
 22 a contributing factor,” after “ordered if”.

23 (o) EFFECTIVE DATE.—This Act shall take effect 30
 24 days after the date of enactment of this Act.

